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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 844

ALBERT J. RUSSO,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

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TO: THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, Albert J. Russo, of Salem, Virginia respectfully prays that a writ of certiorari be issued by this Honorable Court to review the judgment of the Supreme Court of Appeals of Virginia, rendered on the 13th day of June, 1966, and is reported at 207 Va. 251, 148 S.E.2d 820, said opinion appearing hereinafter in the Ap-

pendix, page 1 (A-1), petition for rehearing having been denied in said case by the Supreme Court of Appeals of Virginia on the 9th day of September, 1966 (A-2) and thereby becoming final, and represents as follows:

PROCEEDINGS IN COURTS BELOW

The references made herein are to pages of Record No. 6125, the official record in the Supreme Court of Appeals of Virginia, nine (9) copies of same being filed herewith and are designated as "(R)".

Albert J. Russo, petitioner, was convicted, by jury verdict in the Circuit Court of Roanoke County, Virginia, on September 24, 1964, on a charge of abortion, in violation of Code of Virginia, § 18.1-62 and was sentenced to serve a five year term in the State Penitentiary. Petition for writ of error from said trial court judgment was filed with, and granted by, the Supreme Court of Appeals of Virginia. The trial court judgment was affirmed by the Supreme Court of Appeals of Virginia and petition for rehearing denied by said Court. Nine (9) copies of the appellant's brief for rehearing are filed herewith, and references to same are designated by "(Reh.)". The question involved in the petition for rehearing were as follows (Reh. 1):

> (1) Was the conduct and argument of the Attorney for the Commonwealth and his Special Counsel such as to deny appellant a fair trial and thereby deny him due process of law, in violation of Constitutional guarantees?
>
> (2) Was appellant effectively denied due process of law, as guaranteed by the Constitution, by the absence of effective assistance of counsel?
>
> (3) Did the Trial Judge properly discharge the duties and prerogatives of his position so as to afford appellant fair trial?

(4) Is the effect of the Virginia Rule that objections taken in Trial Court must be likewise excepted to after adverse ruling of Trial Judge such as to deny appellant, on the particular facts and circumstances of the subject criminal case, fair trial and due process of law, as guaranteed by the Constitution?

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1257 (3).

Upon denial of petition for rehearing in the Supreme Court of Appeals of Virginia (A-2) on September 9, 1966, an Order staying execution of judgment was sought and granted (A-3) and execution and enforcement of the judgment of said Court was entered on September 9, 1966 and was thereby stayed until the 8th day of December, 1966 in order that petitioner might present this, his petition for writ of certiorari to review said judgment, to this Honorable Court.

28 U.S.C. § 1257 (3) makes provision for review by way of writ of certiorari where a right, privilege, or immunity specifically set up or claimed under the Constitution is involved and the constitutional provisions involved herein are as follows from the Constitution of the United States:

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor be compelled in any criminal case to be a witness against himself, *nor be deprived of life, liberty*, or property, *without due process of law;* nor shall private property be taken for public use, without just compensation. (Emphasis by Counsel)

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, *and to have the assistance of counsel for his defense.* (Emphasis by Counsel)

Amendment XIV

Section 1

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.* (Emphasis by Counsel)

Constitutional questions were raised in the Supreme Court of Appeals of Virginia by appellant's assignment of error (5) (R-10), which was voiced on page 3 in the brief for appellant filed in the Supreme Court of Appeals of Virginia in the questions in the appeal, as follows:

> 2. Were the arguments of counsel for the Commonwealth proper, or were they of such nature as to prejudice appellant, and cause him to be denied a fair trial?

The fair trial argument raised, as aforesaid, was specifically stated in the appellant's brief for rehearing (Reh. 1) as set forth on page 2 of the within petition.

QUESTIONS PRESENTED

Albert J. Russo assails the judgment of the Courts below and contends:

(I) That he was denied fair trial.

(II) That he was denied due process of law.

(III) That he was denied equal protection of the law.

STATEMENT OF FACTS

The official reporter for the South Eastern Reporter, at 148 S.E.2d 820 has compiled the following syllabus in the subject case:

> 4.
> An objection to opening argument by special attorney for commonwealth, which was made after conclusion or argument and in chambers, came too late.
>
> 5.
> Objection to improper argument of counsel should be made at the time and the court should be requested to instruct the jury to disregard it.
>
> 6.
> Failure to make timely objection to argument ordinarily constitutes a waiver.
>
> 7.
> The effect of improper argument may usually be removed by court if objected to when made; counsel cannot remain silent when improper argument is made and after the whole argument is concluded and in the absence of the jury successfully move for mistrial.

8.
Although commonwealth's attorney's closing argument that he had held his office for twenty years and that if he did not believe that the evidence proved defendant's guilt beyond reasonable doubt he would withdraw "right here and now" was improper and court's rebuke that argument should be kept to evidence and instructions that it was up to jury what they should believe from the evidence was milder than it should have been, defendant could not complain on appeal inasmuch as he made no further request and took no exception.

9.
In order to secure right to have question reviewed on appeal, objection to trial court's ruling must be made and exception taken at the time the occasion arises, otherwise the point is waived.

10.
It is to the ruling of the court that an objection or exception must be directed; if party objecting intends to rely on erroneous ruling in trial court as a ground for reversal in Supreme Court of Appeals, he must make exception thereto in lower court.

11.
Defendant could not be heard in Supreme Court of Appeals with respect to trial court's ruling that evidence had been concluded and that there was no further information the trial court could give jurors who, during their deliberations, had inquired of court "as to whether if the outer os is penetrated whether it will cause a chain reaction that will cause an abortion," where defendant had made no objection in the trial court.

12.
The defendant who did not object in trial court could not argue on appeal that he was prejudiced by trial

court's refusal to grant jurors' request, made during their deliberations, that they be permitted to see transcript of the evidence that the attorneys used during their argument.

Petitioner was represented in the trial court by Davis, Davis and Davis, Attorneys, in the Supreme Court of Appeals of Virginia by other counsel who were not associated in the case in the trial court, and by present counsel on petition for rehearing in the Supreme Court of Appeals of Virginia. The opinion of the Supreme Court of Appeals of Virginia in *Russo v. Commonwealth, supra*, at 207 Va. 257, 148 S.E.2d 825, set forth:

> Objection to improper argument of counsel should be made at the time and the court should be requested to instruct the jury to disregard it. . . .
>
> Counsel cannot remain silent when improper argument is made and after the whole argument is concluded and in the absence of the jury successfully move for a mistrial. . . .
>
> The argument was improper, the court's rebuke was milder than it should have been, but apparently it was satisfactory to defendant's counsel as he made no further request and took no exception.
>
> "We have repeatedly said that in order to secure the right to have a question reviewed on appeal, objection to the trial court's ruling must be made and exception taken at the time the occasion arises, otherwise the point is waived. * * *" . . .
>
> It is to the ruling of the court that an objection or exception must be directed. If the party objecting intends to rely on an erroneous ruling in the trial court as a ground for reversal in this court, he must make exception thereto in the lower court. . . .

And further at 207 Va. 258, 148 S.E.2d 826:

> The defendant now argues that he was prejudiced by these occurrences, but he cannot be heard in this court with respect to these rulings which he did not object to in the trial court, and one of which was made at his request. . . .

The record reveals the following testimony (R-66):

> Mr. Davis, III: Excuse me doctor, for interrupting. We are going to object to anything that he might have been told. He can testify as to his examination and the result of that, but this is a criminal case and not a civil case and we object to anything that he might have been told.
>
> Mr. Lutins: A part of the history, if your Honor, please, as I understand is very important. He would base his diagnosis in part upon history and examination.
>
> The Court: The history that the patient gave him and no one else.
>
> Mr. Lutins: Yes.
>
> The Court: All right.
>
> A. Miss Gaskins gave the history of an *attempted inducement of abortion.* And I examined her in the emergency room at Radford Community Hospital and her general physical examination was within normal limits with the exception of the pelvic examination. (Emphasis by Counsel)

There was no objection to the aforesaid patently objectionable heresay interpretation made by the witness. Also, see but a few questions later (R-67):

> Q. What else did your examination reveal?
>
> A. Well, as I said, the remainder of the examination was essentially normal. She did have some evidence

of bleeding, and our diagnosis on admission was a threatened abortion secondary to an attempted *criminal abortion.*

Q. And what was your ultimate diagnosis, doctor?

A. The ultimate diagnosis on discharge was complete abortion, septic, secondary to *criminal inducement.*

Q. Would you classify this abortion as a spontaneous abortion?

A. No, sir. Under the definition of abortion, medically speaking there are several different kinds. A spontaneous abortion is one that terminates as the result of an abnormal, natural cause rather than on that is induced by an individual either therapeutically or criminally. *This one we felt was criminal abortion under our definition.* (Emphasis by Counsel)

Defense trial counsel sat by and permitted the Commonwealth's medical witness to testify, not once, but three times as to the ultimate issue which only the jury could properly decide in the case, without objection, and reenforced and emphasized this damaging opinion evidence expressed by the Commonwealth's medical witness, Dr. Elswick, by the following cross-examination (R-69):

Q. Now, what cardinal signs did you find when you examined the young lady here in reference to other than her history now-what signs did you find in reference to a *criminal abortion*?

A. Well, there was something that was very distinct as far as diagnosis of a *criminal abortion,* and this is the fact that the outermost mouth of the womb had opened, and the innermost mouth was still closed. With a spontaneous abortion which you have been referring to the innermost mouth of the womb opens first and the outermost mouth of the womb opens secondary to this. (Emphasis by Counsel)

The jury, not once but twice (R-148 and 149) requested clarification as to medical testimony in the case. A shorthand reporter reported the case and was backed up by electronic sound recording device, and with little difficulty the requested testimony could have been read to the jury although typewritten transcript was not then available. Defense counsel did object, and quite properly so, to allowing jury to read transcript of testimony of prosecutrix and other (unknown) Commonwealth witness. Trial counsel did not suggest that reporter read the desired testimony to the jury: The jury sought guidance and clarification from the Court as follows (R-148):

> Juror: We have not yet reached a verdict. This question relates to that verdict.
>
> What the gentlemen of the Jury wants to know, and that question that we've been pondering here, as to whether if the outer os is penetrated whether it will cause a chain reaction that will cause an abortion.
>
> The Court: The evidence in the case has already been taken, you jurors, and there's no further information that the Court can give you. *It's up to you gentlemen to remember* what the evidence was in the case. (Emphasis by Counsel)

Also see R-149:

> The Court: The Sheriff advises the Court that request was made that the transcript of the evidence is being requested by the Jury. I might say that the transcript of the evidence referred to is simply a partial transcript of certain witnesses, and it was simply used by counsel in the argument of the case. And it is not the full evidence in the case and, frankly, *I don't think that if we had the full transcript it would be proper to turn it over to the Jury*, because then you all would be able to rehash it, the evidence from that standpoint. But the so-called transcript is not complete; it's just the evidence of

two witnesses and it would be improper to let you jurors have it. That goes back then, gentlemen, to the fact that you jurors are to remember the evidence in the case and base your decision on what your memory and recollection of the evidence is. So you may retire again. (Emphasis by Counsel)

The closing argument, made to the jury, by the Commonwealth's Attorney was (R-143):

Mr. Richardson: (Closing argument.)
May it please the Court, and you Gentlemen of the Jury, -are the instructions here on the table?

May I say first, to you, having been Commonwealth's Attorney of this County for some twenty odd years; having gone into office the first time in 1932, and having been there ever since, that if I did not believe the evidence in this case proved his guilt, of Dr. Russo, beyond a reasonable doubt, I would withdraw right here and now. Practically everything that we've heard about this case is that Phyllis Gaskins-

Mr. Davis, III: Your Honor, what the Commonwealth's Attorney may believe or may not believe has no bearing in this case, and I object to it.

The Court: Let's keep our argument to the evidence in the case and the instructions of the Court. It's up to the Jury what they will believe from the evidence in the case.

REASONS FOR ALLOWANCE OF CERTIORARI

Petitioner's reason for being before this Honorable Court is simply - that he did not receive a fair trial in the trial court because of: (1) Inadequate, incompetent and ineffective assistance of counsel; (2) Improper and prejudicial argument of the Commonwealth's Attorney; and (3) Failure of Trial Judge to give petitioner fair trial.

The term "fair trial" is similar to the configuation of

that precious stone known as the diamond, in that it has many facets, all of which must be examined in order to determine if it is true and "fair". To determine whether fair trial has been had, the various sides, or facets, of the case must be examined and in the case at bar, obviously, as pointed out in the opinion of the Supreme Court of Appeals of Virginia of June 13, 1966, there are glaring defects. See the syllabus of said case hereinbefore quoted at page _. Other glaring defects, ineffectively handled by defense counsel, are quoted in the Statement of Facts. It is respectfully submitted that the sum total, as appears in the record, shows that fair trial, within the meaning of due process, was not had by petitioner.

It is realized and conceded that many courts have taken the position that a proper distinction is to be drawn between Court appointed and privately retained counsel in considering the question of effective assistance of counsel. See "Effective Assistance of Counsel", 49 Va. L. Rev. 1531 (December, 1963) an excellent authority to which citation is herewith made and reference is respectfully urged, said Law Review Article beginning: "The vague and complex question of what constitutes 'effective assistance of counsel' arises from the landmark decision of *Powell v. Alabama*. The Supreme Court did not elaborate on this elusive term, but rather merely said that 'that duty (to appoint counsel) is not discharged by an assignment at such time or under such circumstances as to preclude the giving of *effective aid* in the preparation and trial of the case' ".

It is respectfully submitted that no valid distinction should be drawn between Court-appointed and privately retained counsel in consideration of the question of effective assistance of counsel. See 49 Va. L. Rev. 1535:

> The rationales supporting the retained-appointed distinction do not seem sound. To impute the acts of an attorney to his client or to place responsibility upon the accused simply because the latter made the selection of counsel is to employ a manifestly

> unjust legal fiction. It is unjust because of the premium placed upon indigency. For if an accused has sufficient funds with which to employ *any* counsel, he must do so, and as a consequence, his petition or appeal claiming ineffective assistance is regarded less sympathetically than if he had been assigned counsel The rationales are fictional because of the absurdity of assuming that a layman is capable, in selecting his counsel, of adequately judging the professional ability of an attorney. But even if the validity of such an assumption were conceded, it is apparent that the courts are approaching the problem from the wrong perspective. In most cases it is not the competency, or innate ability, of the lawyer that is questioned, but rather the assistance he actually renders in conducting the defense. Thus, the courts are requiring the solvent defendant not only to choose a competent lawyer, but also to guarantee himself effective assistance in the preparation for trial and during the trial itself.

The Supreme Court of Appeals of Virginia has its established rule on the subject, as reannounced and affirmed as recently as September 9, 1966 in *Hoffler v. Peyton*, 207 Va. 302, 309, 149 S.E.2d 893, 897, as follows:

> Ordinarily, lack of preparation, mistakes or errors of judgment, improper advice or trial strategy in connection with a case are insufficient to justify setting aside a judgment of conviction. Annotation: 74 A.L.R. 2d, § 4 (a), p. 1399 ff.; 21 Am. Jur. 2d, Criminal Law, § 315, p. 342.
>
> Among the cases which support this principle is *Penn v. Smyth*, 188 Va. 367, 49 S.E.2d 600. There we held that the failure of counsel employed by the defendant to "exercise a high degree of professional diligence" did not constitute an ineffective representation of counsel or render the trial a nullity; that the "acts of omission and commission by counsel" are merely risks which every litigant must take. 188 Va. at 372, 49 S.E.2d at 602.

See 74 A.L.R.2d 1390 for Annotation "Incompetency of Counsel chosen by Accused as Affecting Validity of Conviction", wherein is set forth at page 1399:

> In considering the contention of the petitioner in a habeas corpus proceeding that an attorney employed by his mother did not afford him capable and adequate representation, such inadequacy amounting to a denial of due process of law, the court in *Penn v. Smyth*, (1948) 188 Va 367, 49 SE2d 600, said that this was a federal question and the views of the Supreme Court of the United States with respect to it were controlling, but that up to that time there had been no express decision by that court of this question where the accused selected his own counsel.

Research of petitioner's counsel has failed to reveal any decision of his Honorable Court on this important subject, although it must be conceded certiorari has been denied in many cases which would have presented the point. It is respectfully urged that a differentiation and distinction drawn between the standard of representation between Court-appointed counsel and privately retained counsel denies a non-indigent criminal defendant due process of law in that he is held to a higher standard than an indigent would be. There should be no significance drawn by the circumstance that defense counsel was of his own choice in considering the incompetency of such counsel at trial.

A duly licensed attorney and member of the Bar is presumed to be competent, and it is not alleged that defense trial counsel are incompetent attorneys, but rather that their representation of the petitioner at his trial was ineffective to the extent that he was denied effective assistance of counsel. It is an elementary rule of Virginia practice and procedure, both civil and criminal, that an objection to improper evidence or misconduct must be made and exception taken in the event that the Trial Judge overrules the objection for the point to be preserved for appellate consideration in said Commonwealth. Of course, the better and more enlightened rule (made by Statute in some States) is that reservation of exception is not necessary if proper objection is voiced. See 5 Am. Jur. 2d 41, Appeal and Error § 558: "However, in many jurisdictions it is no longer necessary to make a formal exception

in order to preserve an objection for appeal, it being generally sufficient that the party make known to the Court his objection and his grounds therefor".

Also see § 559: "In jurisdictions where an exception is a prerequisite of review of a matter objected to, the appellate court may nevertheless review rulings of the trial court and correct errors apparent on the record, even in the absence of an exception". (The footnote to the aforesaid sentence cites as authority *United States v. La France*, 282 U.S. 568, 75 L. Ed. 551, 51 S. Ct. 278 and further states "The Supreme Court in the exercise of its appellate power is not precluded from looking at any evidence of record which, whether or not called to the attention of the court below, is relevant to and may affect the correctness of its decision sustaining or denying any contention which a party has made before it" *Marconi Wireless Tel. Co. v. United States*, 320 U.S. 1, 87 L. Ed. 1731, 63 S. Ct. 1393.) Yet, the Supreme Court of Appeals of Virginia states:

> "The defendant now argues that he was prejudiced by these occurrences but he cannot be heard in this Court with respect to these rulings which he did not object to in the trial court . . . We find no reversible error in the trial and judgment of conviction is affirmed."

While such a rule of appellate procedure is easy to follow and simplifies the work of the Virginia Appellate Court it is manifestly unjust under the facts and circumstances of the case at bar in that unquestionably the worst imaginable prejudice to petitioner resulted in the failure of defense trial counsel to take exception to the court's overruling of objections made. The Supreme Court of Appeals of Virginia in finding the argument of the Commonwealth's Attorney improper, the court's rebuke to such argument too slight merely stated:

> "We have repeatedly said that in order to secure the right to have a question reviewed on appeal, objection to the trial court's ruling must be made and

> exception taken at the time the occasion arises, otherwise the point is waived."

Yet defense trial counsel did not make objections obviously necessary to effectively protect defendant's rights in many instances, and where proper objections were made failed to perfect same by excepting to being overruled by the trial judge. These were not errors in tactics such as are not the proper subject of appellate review, but were rather vital errors of trial procedure severely prejudicing petitioner's right to fair trial and effective assistance of counsel to insure same. All that it would have taken were the mere words "objection" and "exception" to have brought prejudicial error and, therefore, reversible error satisfactorily before the Supreme Court of Appeals of Virginia. Certainly the fair and obvious implication of the Virginia Court's opinion is that many errors, and prejudicial errors, were present in the record but not subject to reversal because of ineffective trial procedural performance on the part of defense trial counsel.

The subtle psychology of an unfair trial is like an iceberg, it is so unconscious or rather subconscious that it hardly even protrudes and is unnoticed at the time, because of the climate and atmosphere of the occasion. Inflammatory remarks made by counsel in argument which are calculated to appeal to the passions and prejudices of a jury are improper. 88 C.J.S. 371, Trial § 187. Also see 53 Am. Jur. 392, Trial § 486:

> Guilt of Accused; Expression of Personal Opinion of Prosecutor.--The right of a prosecuting attorney to draw in his argument all legitimate inferences from the evidence authorizes him to assert a belief based on the evidence that the accused is guilty. However, it is universally held that remarks indicating the prosecuting attorney's personal opinion that the defendant is guilty are not merely a breach of professional propriety and professional ethics, but constitute legal error considered in many cases so flagrant as to require a new trial or a reversal of the conviction.

The Trial Court should protect litigants from misconduct of counsel of its own motion without waiting for objections from opposing counsel and should promptly suppress arguments calculated to arouse the passion or prejudice of the jury, and caution the jury against being influenced by improper considerations urged therein. While it has been said that opposing counsel is not required to object where the misconduct is so prejudicial that it must have influenced the jury, if the Court fails to act of its own motion, it is the duty of counsel to protect a client by objection, and as a general rule, unless the misconduct is such as to make it the duty of the Court to interfer sua sponte, an objection must be made and a ruling had thereon in order to take advantage of the error in such improper conduct. While argument by a prosecuting attorney merely urging jurors to do their duty and to enforce the criminal law generally or the particular law under which the prosecution was instituted is proper, where counsel goes beyond an appeal to the jury to do their duty and enforce the law and urges a conviction because of extraneous consideration, or states facts and conclusions not supported by the evidence, and urges a conviction by reason thereof, the argument is improper. 53 Am. Jur. 404, Trial § 500 (See R-144). The Trial Court should not only sustain objections to improper conduct and argument of counsel and charge the jury to disregard it, but should rebuke and reprimand offending counsel as well, in order to stop its repetition. In some cases a prompt rebuke has been held sufficient to cure the effect of an improper statement to the jury; in others, a reprimand by the Court, even though coupled with an admonition to the jury to disregard the improper argument has been held not to cure the injury. 53 Am. Jur. 410, Trial § 507 (see R-141, 143 and 145). It is the duty of the Trial Judge, without necessity of objection to hold arguments to jury within the record of the case. See *City of Dallas v. Johnson* (Texas) 54 S.W.2d 1024.

Did petitioner have a "fair trial" under these circumstances upon consideration of the entire record of the

case — it is respectfully urged that he did not. "It is well settled that the right of an accused to have effective assistance of counsel is guaranteed by the due process clause of the Federal Constitution and the Virginia Bill of Rights". *Whitley v. Cunningham,* 205 Va. 251, 252, 135 S.E.2d 823, also *Gideon v. Wainwright,* 372 U.S. 335, 339, 9 L. Ed. 2d 799, 83 S. Ct. 792, 93 A.L.R.2d 733.

It is ridiculous to say, as some courts have, that the lack of skill and incompetency of an attorney is imputed to the defendant who has employed him and the acts of the attorney thus become those of the defendant client and are to be so recognized and accepted by a court, unless the defendant repudiates them by making known to the court at the time his objection or lack of concurrence in them. Some courts have further taken the position that a defendant cannot seemingly acquiesce in his attorney's defense of him or his lack of it and, after the trial has resulted adversely to defendant, obtain a new trial because of the incompetency, negligence and/or unskillfulness of his attorney. However see *Coates v. Lawrence* (5th Cir.) 46 F. Supp. 414, aff'd, 131 F.2d 110, which states that the aforesaid rule has no application when it is made to appear that the defendant is ignorant of his rights and unacquainted with the course of proceedings in criminal cases. In that event if the attorney selected by such a defendant is so incompetent or dishonest or so improperly conducts defendant's case as to amount practically to no representation, the defendant is prejudiced and thereby deprived of a fair trial and a court should grant relief by the use of a writ of habeas corpus. The case at bar is not a collateral attack which might be available under habeas corpus, but rather a direct appeal to this Honorable Court to correct the manifest injustice accorded defendant at trial.

See *United States v. Parrion* (2d Cir.) 212 F.2d 919, 925:

> "Surely the courts have a considerable responsibility for the conduct of lawyers whom they admit to practice and whom they thereby invest with power to counsel laymen. To be sure, as my colleagues say, a court does not represent 'that the members of its bar are infallible' ".

Also see *People v. Nitti*, 312 Ill. 73, 89 N.E. 448, 454 wherein the court said:

> "At the time the attorney appeared for these defendants he held a license from this court which certified to the public that he was competent to properly represent any client who might employ him, and any person employing him had a right to rely upon that certificate [and that it must] take into consideration the gross incompetency and stupidity of counsel . . .".

Surely, this Honorable Court will not follow the Virginia rule which seems to dictate that it must administer "injustice according to law". The fundamental rights and liberties of the individual as guaranteed by the Bill of Rights must be protected by this Honorable Court when the State fails to recognize and accord them. It is indeed difficult for the layman to understand why the Virginia Appellate Court cannot, or did not, consider prejudicial matters erroneously admitted into the trial of a case when objection had been made thereto, merely because defense counsel failed to take exception after being overruled. The newest member of the bar, and most law school students, can fully understand and appreciate the legal reasoning which is the basis for the Virginia Court's long established rule of not considering objections to which exception was not saved in the trial court, and so should have defense counsel in the case at bar had competent and effective assistance of counsel been accorded petitioner. Can it be accepted that petitioner cannot be here heard on his point of incompetent and ineffective as assistance of counsel at trial because he failed to then and there disown, discharge and dismiss trial counsel, or to then and there point out to the trial court the inad-

equate representation being made on his behalf. Surely the answer to this must be that no such argument is worthy of serious consideration. See 49 Va. L. Rev. 1555:

> "The rationale is that since defendant has chosen his own lawyer he is presumed to acquiesce in all of his lawyer's activities; and if he does not, he must so notify the court. The weakness in this argument, however, is that the average defendant, unversed in matters of trial procedure, would not generally know of his lawyer's inadequacies *until after* the trial, when it is too late to notify the court."

This Honorable Court has never held that an accused is entitled to representation by a lawyer meeting a designated aptitude test. It has never used the term to refer to the quality of the service rendered by the lawyer. The court has held that an indigent accused is entitled to counsel; that appointed counsel must have reasonable opportunity to prepare for defense; that appointed counsel must have no divergent interest, etc., but the court has not yet accepted a case turning upon the appraisal of the quality of the defense. See *Mitchell v. United States* (C.A. D.C.) 259 F.2d 787, cert. denied, 358 U.S. 850, 79 S. Ct. 81, 3 L. Ed. 2d 86. In proper cases, lower courts have set aside verdicts and awarded new trials where ineffective assistance of counsel and denial of due process have been found in the record and by various proceedings establishing facts outside the record.

Here, the record is clear and it is respectfully submitted that this is a proper case for issuance of writ of certiorari. In *Jones v. Huff* (C.A. D.C.) 152 F.2d 14, the court held:

> If it be true that the evidence against the accused was improperly admitted in violation of his Constitutional right, that witnesses who would have established his innocence were not called by his counsel, that no defense was offered by counsel although the accused was innocent, and that a document which would have established his innocence was not offered by counsel even though a juror re-

> quested it, can it be said that the accused had a fair trial even within the stringent rule which we have stated and now apply? We think not. The combination of circumstances, if true, is exceptional. The allegations are improbable, but if they be true, it seems clear that the petitioner did not have a trial as we understand that term. These were not mere mistakes of counsel or errors in the course of the trial. If true, they constituted a total failure to present the cause of the accused in any fundamental respect. Such a proceeding would not constitute for the accused the fair trial contemplated by the due process clause of the Fifth Amendment.

In *Lunce v. Overlade* (7th Cir.) 244 F.2d 108, 74 A.L.R.2d 1384, the court held that a petitioner who accepted the services of Ohio counsel who knew nothing concerning Indiana law or procedure was deprived of the right to effective counsel, and that the incompetence of the defense was so apparent as to call for intervention by officers of the State, even where such counsel was privately engaged. Said case states:

> "The record made by Ohio counsel in his defense of petitioners irrefutably demonstrates that he was so ignorant of Indiana law and procedure that it was virtually impossible for him to protect or even to assert petitioners' rights."

The case at bar is not as flagrant a case as the Lunce case, but the same principles are present.

This enlightened court must recognize the necessity for effective assistance of counsel so as to accord a defendant the mandate of due process of law. In the case at bar, the defendant's fair trial was prejudiced by (1) the improper remarks and argument of the Attorney for the Commonwealth and his Special Prosecutor, (2) the acquiescence of the Trial Judge in allowing improper and prejudicial conduct on the part of the Commonwealth and upon objection by defense counsel, only mildly and ineffectively attempting to correct improper argument, and (3) the ineffective objections made by defense trial counsel to the

highly prejudicial arguments and remarks of the Commonwealth and failure to take exception and request Court to declare mistrial or properly instruct jury, and the failure to make objections to highly prejudicial and improper testimony. From the very nature of these omissions and failure to take timely action it must be plain that defendant was grievously prejudiced and denied due process.

CONCLUSION

It is respectfully submitted that the petition of Albert J. Russo herewith made for writ of certiorari should be granted upon the facts and circumstances of the trial of his case as reflected by the record of same and that the judgment of the trial court should be reversed and the case remanded for new trial, in accordance with the law and Constitutional guarantees of fair trial so as to accord petitioner due process of law not in deprivation of his constitutional rights.

PRAYER

Accordingly, petitioner respectfully prays that a writ of certiorari be issued out and under the seal of this Honorable Court directed to the Supreme Court of Appeals of Virginia.

Respectfully submitted,

STUART A. BARBOUR, JR.
418 Second Street, S. W.
Roanoke, Virginia

Attorney for Petitioner

PROOF OF SERVICE

I, John K. Brewer, Office Manager of Thiel Press, printer of the within petition for petitioner, depose and say that on the 8th day of December, 1966, copies of the foregoing petition were served in accordance with Rule 33 of the Rules of the Supreme Court of the United States, by mailing a copy of same, with first class postage prepaid, to the following counsel of record:

ROBERT Y. BUTTON, Attorney General of Virginia
Supreme Court Building
Richmond, Virginia

M. HARRIS PARKER, Assistant Attorney General
Supreme Court Building
Richmond, Virginia

_____
John K. Brewer

Subscribed and sworn to before me at Washington, D. C., this 8th day of December, 1966.

_____
Notary Public

My commission expires: _____

APPENDIX

OPINION BY JUSTICE ARCHIBALD C. BUCHANAN
Richmond, Virginia, June 13, 1966

ALBERT J. RUSSO

-v- Record No. 6125

COMMONWEALTH OF VIRGINIA

FROM THE CIRCUIT COURT OF ROANOKE COUNTY
Vincent L. Sexton, Jr., Judge Designate

The defendant, Albert J. Russo, a medical doctor, was indicted for abortion performed on Phyllis Gaskins, in violation of § 18.1-62 of the Code.* A jury found him guilty as charged, fixed his punishment at five years in the penitentiary, and sentence was pronounced on him in accordance with the verdict.

On this appeal from the judgment of conviction, and under his assignments of error, the defendant contends that the "medical evidence" of induced abortion was not sufficient to support the verdict; that counsel for the Commonwealth made improper and prejudicial arguments; that inadmissible evidence was allowed to be introduced, and that the indictment was insufficient and his motion to quash it should have been sustained. These contentions will be discussed in that order.

The Commonwealth was, of course, not limited to

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* "If any person administer to, or cause to be taken by a woman, any drug or other thing, or use means, with intent to destroy her unborn child, or to produce abortion or miscarriage, and thereby destroy such child, or produce such abortion or miscarriage, he shall be confined in the penitentiary not less than one year nor more than ten years. No person, by reason of any act mentioned in this section, shall be punishable when such act is done in good faith, with the intention of saving the life of such woman or child."

"medical evidence" to support the verdict. We look to the whole evidence and view it with the conflicts in it and the fair inferences from it settled as determined by the jury. Wright v. Commonwealth, 196 Va. 132, 82 S.E.2d 603; Crisman v. Commonwealth, 197 Va. 17, 87 S.E.2d 796. The evidence to support the verdict was as follows:

Phyllis Gaskins, an eighteen-year-old girl and unmarried, was a member of the freshman class at Radford College. On Saturday, April 4, 1964, she called the defendant, Dr. Russo, whom she did not know, at his office in Salem, some forty-five miles away, and made an appointment to see him at his office the following Friday night, April 10. A college suite mate took her and they arrived at defendant's office about 7:30 p.m. She went there for the purpose of finding out whether she was pregnant. She told defendant that she had missed her period and would like to have an examination to see what was wrong. He examined her and told her she was then six weeks pregnant. She told him she was not married and did not want to have the baby. He told her he would like to help her and he gave her a prescription, which she had filled. He told her to take the pills and see if they would work, and if they did not to come back and he would make her have a miscarriage so she would not have the baby, but that it would cost $500.

The following Monday, April 13, Miss Gaskins went again to the defendant's office to tell him that she thought she could get the money by Saturday, and he told her to come back Saturday afternoon, April 18.

She was able to get a Western Union money order payable to her for $500. She endorsed it and took it to the defendant on Saturday, as arranged. The defendant, who also dealt in real estate, wrote on the back of the money order "Lot 22," endorsed it and received value for it at the bank.

On receipt of the $500 money order the defendant told Miss Gaskins to take her panties off, get up on the oper-

ating table and put her feet in the stirrups. She testified that "then he took a probe or some kind of an instrument but I couldn't see exactly what it was, and inserted that in me, and that is all I could see." She could only see that the instrument was silver colored.

After this instrument was inserted she "started bleeding a lot," and he gave her a sanitary towel to use until she got back to school. He gave her some capsules to take if she started getting a fever. She went back to the defendant's office on Monday, April 20, "and he did the same thing that he had done Saturday, he inserted some kind of a probe, and then he also put a rubber tube about twelve inches long, I I guess—I don't know—, and inserted that, and he said that was to cause pain or something like that to help bring on the miscarriage. And he said if I was to get a high fever or anything during the night or that my fever should go up to remove the tube and wash it out and bring it back to him the next day." That night she had a headache and a very high temperature with chills. She stayed in bed next day, April 21, and her girl friends wanted to take her to the college infirmary, but she called defendant instead and told him her condition and he told her to come to him immediately if she possibly could, and if not to get a shot of penicillin from the doctor, "but not to let him examine me."

Accordingly Miss Gaskins called a cab "to get there the quickest way I could," and arrived at defendant's office about noon that day. Defendant gave her penicillin and some capsules for her fever, and she spent the afternoon until about five o'clock on a bed in his office. On her reday, April 22, was taken to the Radford Hospital, where she told the college physician, the president of the college and the dean of the college that an abortion had been performed on her. There a miscarriage took place on the night of April 24.

At the hospital she was examined on April 22 by Dr. Elswick and by Dr. Haas on April 23. These two doctors

were specialists in obstetrics and gynecology and practiced as partners. Both took care of the hospital patients.

Dr. Elswick testified that Miss Gaskins gave the history of an attempted inducement of abortion. "The pelvic examination revealed a uterus, a womb with two and a half to three months pregnancy size, and the mouth of the womb had been opened, obviously mechanically by some means, so that the outermost mouth of the womb was opened, but the inner mouth was still closed." He said their diagnosis on admission was a threatened abortion secondary to an attempted criminal abortion, and that the ultimate diagnosis on discharge was "complete abortion, septic, secondary to criminal inducement."

He further testified: "Under the definition of abortion, medically speaking there are several different kinds. A spontaneous abortion is one that terminates as the result of an abnormal, natural cause rather than one that is induced by an individual either therapeutically or criminally. This one we felt was criminal abortion under our definition." Dr. Elswick explained that a therapeutic abortion is the termination of a pregnancy to preserve the health of the mother. Defendant's counsel stated that there was no suggestion here of any therapeutic abortion.

Dr. Elswick testified also that the uterus of Miss Gaskins was retroflexed and "this means that it was bent on itself and had fallen back. In the normal position the womb is up, and it had fallen back at the time of my examination." But, he said, this could not have existed on April 10 when defendant first examined her because examination of the fetus after the abortion showed that apparently the membrane had ruptured, or had been ruptured, and the fluid from the pregnancy had leaked out, allowing the uterus to obtain a smaller size and fall back out of position. He said that the retroflexed position of the uterus seldom, if ever, results in abortion; that it can, but almost never does. Miss Gaskins testified that when defendant examined her on April 10 he said nothing about anything being wrong with her uterus.

On cross-examination Dr. Elswick was asked what "cardinal signs" he found in reference to a criminal abortion. He replied: "Well, there was something that was very distinct as far as diagnosis of a criminal abortion, and this is the fact that the outermost mouth of the womb had opened, and the innermost mouth was still closed. With a spontaneous abortion which you have been referring to the innermost mouth of the womb opens first and the outermost mouth of the womb opens secondary to this."

The testimony of Dr. Haas was in agreement with that of Dr. Elswick. He testified that at the time Miss Gaskins was admitted to the hospital abortion was inevitable, meaning that it could not be saved; and that he diagnosed it as induced septic abortion, meaning that some external force was used on the uterus. He had never seen or heard of a retroverted uterus causing an abortion, and it did not cause this one, he said.

For the defendant, Dr. William Joseph Ellis testified that he engaged in the general practice of medicine in Covington, including obstetrics, and was associated with the Alleghany Memorial Hospital there. He was shown a copy of the hospital record of the Radford Hospital with reference to Miss Gaskins, which he had previously examined. He was then asked whether there was anything in that record consistent with criminal abortion other than the history related by the patient. He replied, "No, sir, there isn't." He disagreed with Doctors Elswick and Haas in their conclusions, and stated his opinion to be that in order to effect an abortion by instrumentation the internal os (mouth of womb) would have to be entered; that a retroflexed uterus can cause an abortion, but be conceded that it almost never does.

The defendant testified that he had been practicing medicine in Salem for twenty-three years as a general practitioner; that he did not perform any abortion on Miss Gaskins; that she came to see him first on April 10 to find out whether she was pregnant; that he then made a pelvic

examination and was not sure she was pregnant; that he gave her a prescription "to see if it would start her" but he did not use any kind of an instrument; that she came by his office on April 13 to talk to him about the possibility of an abortion, "which I wouldn't do, and she said that she would offer me $500 if I would take care of her if she got started. * * I told her that I couldn't do anything; that if she could get started that I could go ahead and follow up on it." He further testified that when Miss Gaskins came back to see him on April 18, he did not use any instrument on her to cause an abortion; that he used a speculum to examine the uterus, which he thought was retroflexed, and he assumed "that he were going to deal with possibly a spontaneous abortion if nothing was done." When she came to see him on Monday, April 20, she was running a fever and he just gave her penicillin and some pills for fever, and that was all he did.

He said that when Miss Gaskins came back to see him on April 18 she gave him $500, for which he was "to look after her for complete care," and that she understood that "either she was to start by herself or someone else was to start her." He testified that the reason he put "Lot 22" on the $500 money order was to avoid publicity, to save the name of the girl and of her family, and of her college. Asked if he was somewhat interested in the $500, he replied, "She offered it to me. I would have taken a thousand if she gave it to me. It's worth it to handle any kind of a case like this."

Very clearly the verdict of the jury was well supported by the evidence and the motions to strike and to set aside the verdict were properly overruled.

The defendant next insists that improper and prejudicial arguments were made by counsel representing the Commonwealth. His objections, for the most part made here for the first time, were numerous, but only the following require any discussion:

The special attorney for the Commonwealth, opening the argument, felt the urge to tell the jury that they had "the burden of this wonderful jury system" which afforded the accused the presumption of innocence, followed by the statement: "Yet if we acquit this man today there will be a line at 21 College Avenue, which will foster this very illegal procedure which the law seeks to curb. We will say, 'Hurrah, let it be, illegality there is a premium.'" After the conclusion of this oration defendant's counsel asked to see the court in chambers and there stated that he did not interrupt Mr. Lutins because he preferred not to, but that he excepted to his argument "about if you acquit this man what would happen", and he asked the court to declare a mistrial. The court properly overruled the motion because the objection came too late.

Objection to improper argument of counsel should be made at the time and the court should be requested to instruct the jury to disregard it. 2 Mich. Jur., Argument and Conduct of Counsel, § 21, p. 83, and 1965 Cum. Supp., p. 16. Failure to make timely objection ordinarily constitutes a waiver. State v. Cirullo, 142 W. Va. 56, 93 S.E.2d 526. The effect of improper argument may usually be removed by the court if objected to when made. Counsel cannot remain silent when improper argument is made and after the whole argument is concluded and in the absence of the jury successfully move for a mistrial.

The Commonwealth's attorney began his closing address to the jury in this fashion: "May I say first, to you, having been Commonwealth's Attorney of this County for some twenty odd years; having gone into office the first time in 1932, and having been there ever since, that if I did not believe the evidence in this case proved his guilt, of Dr. Russo, beyond a reasonable doubt, I would withdraw right here and now."

Defendant's counsel then said: "Your Honor, what the Commonwealth's Attorney may believe or may not believe has no bearing in this case, and I object to it."

The court said: "Let's keep our argument to the evidence in the case and the instructions of the Court. It's up to the Jury what they will believe from the evidence in the case."

The argument was improper, the court's rebuke was milder than it should have been, but apparently it was satisfactory to defendant's counsel as he made no further request and took no exception.

"We have repeatedly said that in order to secure the right to have a question reviewed on appeal, objection to the trial court's ruling must be made and exception taken at the time the occasion arises, otherwise the point is waived. * * *" Gaumont v. Highway Commissioner, 205 Va. 223, 225, 135 S.E.2d 790, 791.

It is to the ruling of the court that an objection or exception must be directed. If the party objecting intends to rely on an erroneous ruling in the trial court as a ground for reversal in this court, he must make exception thereto in the lower court. Gall v. Tea Company, 202 Va. 835, 120 S.E.2d 378. In that case we said:

> "During the course of a trial many objections are made which at first blush may appear to counsel to have some substance, but after argument of counsel and the court has made its ruling the original objector is sometimes convinced that the court's ruling is correct and he has no intention of further relying on the point raised. The failure of counsel to save the point, or to take an exception, may well lull the court into believing that counsel acquiesced in its ruling. Hence, the requirement of the rule has a salutary effect." 202 Va. at 838, 839, 120 S.E.2d at 381.

The jury interrupted its deliberation to inquire of the court "as to whether if the outer os is penetrated whether it will cause a chain reaction that will cause an abortion." The court replied that the evidence had been concluded and that there was no further information that the court could give them. No objection was made by the defendant to this ruling.

Later the jury asked to see the transcript of the evidence that the attorneys used during their argument. The defendant objected and the request was refused. The court informed the jury that the transcript was not complete but only the evidence of two witnesses and it would be improper for the jury to have it.

The defendant now argues that he was prejudiced by these occurrences, but he cannot be heard in this court with respect to these rulings which he did not object to in the trial court, and one of which was made at his request.

Defendant next contends that the indictment charged him with using and employing "a certain instrument" on the prosecuting witness, and consequently evidence as to the use of a drug should not have been admitted. Miss Gaskins testified, without objection, that defendant first gave her pills to see if they would work. The druggist who filled the prescription said they were ergo apiol, used to control bleeding and in labor to cause contraction of the uterus. Defendant testified that it would not bring on an abortion. This evidence formed a part of the whole transaction, was relevant to the intent of the defendant, which is an element of the crime defined by the statute, Anderson v. Commonwealth, 190 Va. 665, 58 S.E.2d 72, and was admissible for these purposes. Moreover, it was not objected to in the court below and defendant cannot be heard to object to it in this court.

Defendant's final contention is that the indictment was invalid because it failed to negative the provisions of the statute that no person shall be punished under it if he acted in good faith with the intention of saving the life of the mother or child. This is an exception made in a substantive clause subsequent to the enacting clause of the statute, and we hold it to be a matter of defense for the defendant to assert and not for the indictment to deny. Devine v. Commonwealth, 107 Va. 860, 60 S.E. 37; Cochran v. Commonwealth, 122 Va. 801, 94 S.E. 329.

We find no reversible error in the trial and the judgment of conviction is affirmed.

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Friday the 9th day of September, 1966.

Albert J. Russo, Plaintiff in error,

against Record No. 6125

Commonwealth of Virginia, Defendant in error.

ORDER STAYING EXECUTION OF JUDGMENT

Upon consideration of the application of the plaintiff in error, by counsel, praying for a stay of execution of the judgment entered herein on September 9, 1966, in order that he may have reasonable time and opportunity to present to the Supreme Court of the United States a petition for a writ of certiorari to review the judgment of this court, it is now ordered that the execution and enforcement of the judgment of this court in the above-styled case entered on September 9, 1966, be, and the same is hereby stayed, until the 8th day of December, 1966, on the expiration of which time the same may be enforced unless the case has been before that time docketed in the Supreme Court of the United States, in which event enforcement thereof shall be stayed until the final determination of the case by that court.

The above stay, however, is not to discharge the petitioner from custody, if in custody, or to release his bond if out on bail.

A Copy,

Teste:

H. G. Turner

Clerk

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Friday the 9th day of September, 1966.

Albert J. Russo, Plaintiff in error,

against

Commonwealth of Virginia, Defendant in error.

Upon a Petition to Rehear

On mature consideration of the petition of the plaintiff in error to set aside the judgment rendered herein on the 13th day of June, 1966, and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,

Teste:

H. G. Turner

Clerk